HEIRS OF JOSEPH PERRIN

IBLA 91-466 Decided February 14, 1995

Appeal from a decision of the California State Office, Bureau of Land Management, rejecting application for patent of railroad grant land.
CACA-24904.

Set aside and remanded.

1. Railroad Grant Lands

A decision rejecting an application, pursuant to the Act of Oct. 17, 1978, 49 U.S.C. § 10721(a)(2) (1988), seeking a patent of railroad grant lands for the benefit of the successors-in-interest of a purported innocent purchaser for value from the railroad company prior to Sept. 18, 1940, for failure to provide proof that the land was actually conveyed to the purchaser, will be set aside where the record establishes that the railroad sold the land to the purchaser upon receipt of the full payment price.

APPEARANCES: Lawrence M. Whitfield, Esq., Redding, California, for appellant; William A. Kennedy, Deputy State Director, Operations, Bureau of Land Management, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Heirs of Joseph Perrin (Heirs) have appealed from a decision of the California State Office, Bureau of Land Management (BLM), dated August 19, 1991, rejecting the application by the Southern Pacific Transportation Company (Southern Pacific) filed for a patent of railroad grant land (CACA-24904). 1/

1/ According to the patent application, the Heirs are Frances G. Perrin, George E. and Helen M. Perrin, Glenn R. Perrin, Lewis O. Perrin, Mary Ristuccia, and Evelyn L. Simons. See also BLM Decision, dated July 11, 1989, at 1.

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On May 2, 1989, Southern Pacific, as successor-in-interest to the Central Pacific Railroad Company (Central Pacific), filed an application
on behalf of the Heirs seeking a patent to a tract of land described as
the SW¼ SW¼ sec. 3, T. 15 N., R. 8 E., Mount Diablo Meridian, Nevada County, California. 2/

Historically, in order to aid in construction of the railroad, alternate (odd-numbered) sections of the public lands within 20 miles on either side of the railroad line, including section 3 at issue here, were granted to Central Pacific upon the definite fixing of the location of the railroad. See United States v. Southern Pacific Transportation Co., 66 IBLA 191, 192 (1982); United States v. Tobiassen, 10 IBLA 379, 381 (1973). The grant was effected by section 3 of the Act of July 1, 1862, ch.120, 12 Stat. 492, as amended by section 4 of the Act of July 2, 1864, ch. 216, 13 Stat. 358. Excepted therefrom were "mineral lands" (other than coal and iron lands). 12 Stat. 492; 13 Stat. 358; Samuel W. Spong, 5 L.D. 193, 194 (1886). It is undisputed that no patent of the SW¼ SW¼ sec. 3 ever issued from the United States to Central Pacific or its successors-in-interest. See Decision at 2. Thus, the land has remained unpatented.

On October 16, 1940, Central Pacific released its claims against the United States to any remaining unpatented railroad grant land (including the SW¼ SW¼ sec. 3), in accordance with the terms of section 321(b) of the Transportation Act of 1940, ch. 722, 54 Stat. 954 (formerly codified at 49 U.S.C. § 65(b) (1976)), enacted on September 18, 1940, in return for the right to charge higher rates for carrying Government freight. 3/ See Southern Pacific Co., 76 I.D. 1, 2 n.1 (1969), aff'd, Southern Pacific Co. v. Hickel, No. S-1274 (D. Cal. Dec. 2, 1970). The release was approved December 28, 1940. See 6 FR 2634 (May 29, 1941). By its terms, section 321(b) of the Transportation Act of 1940 did not preclude the United States from issuing a patent confirming title in such land as had been sold to an innocent purchaser for value prior to September 18, 1940. See 43 CFR 2631.0-8 and 2631.4. Thus, Central Pacific excepted from its release, land sold to such purchasers. See Southern Pacific Co., 76 I.D. at 2 n.1.

2/ The land sought was described in the patent application as the SW¼ SW¼ sec. 3. The BLM decision states that this land is "actually described as lot 33 and contains 32.56 acres" (Decision at 1). The SW¼ SW¼ of the section is partially covered by the "Belle of France" mining claim (Mineral Survey No. 3227), located by Theophile Pettijean (or Petitjean) Sept. 8, 1887. See Exh. G, attached to "Application for Patent," at 9. Thus, lot 33 embraces the remaining land in the quarter-quarter section, which was not segregated by the mineral survey. See Copy of Original Survey Plat of T. 15 N., R. 8 E., Mount Diablo Meridian, dated Mar. 31, 1871. It does not appear from the record that the mining claim has been patented.

3/ Section 321(b) of the Transportation Act of 1940 had required that releases of claims be filed within one year from Sept. 18, 1940, i.e., on or before Sept. 18, 1941. See 49 U.S.C. § 65(b) (1976); 43 CFR 2631.0-8.

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Section 321(b) of the Transportation Act of 1940 was repealed by section 4(b) of the Act of October 17, 1978, P.L. No. 95-473, 92 Stat. 1466, 1468, subject to rights that matured before that date. The 1978 Act continued to provide that the United States was not prevented from issuing a patent confirming title where the railroad or its predecessor-in-interest had sold such land to an innocent purchaser for value prior to September 18, 1940. See 49 U.S.C. § 10721(a)(2) (1988).

In its May 1989 patent application, Southern Pacific asserted that, following the railroad grant of the SW¼ SW¼ sec. 3, Joseph Perrin (Perrin), the Heirs' predecessor-in-interest, had been an innocent purchaser for value of that land prior to enactment of section 321(b) of the Transportation Act in 1940, and thus it sought a patent to that land under the Act of October 17, 1978. It contended that the land had been sold by Central Pacific to Perrin as evidenced by a Treasurer's Receipt dated June 2, 1871. See "Application for Patent," dated Jan. 15, 1989, at 2. The Heirs have also provided evidence that this land was part of Perrin's estate distributed to his wife subsequent to his death and finally devolved to the Heirs. See Letter to BLM from Snow, dated July 15, 1989, at 3.

In its August 1991 decision, BLM rejected Southern Pacific's patent application because the applicant had failed to demonstrate that Perrin had ever received title to the SW¼ SW¼ sec. 3 from Central Pacific, as required by 43 CFR 2631.1. Asserting that they are the "real parties-in-interest," the Heirs appealed from the August 1991 BLM decision.

Formerly under section 321(b) of the Transportation Act of 1940 and now under the Act of October 17, 1978, the Secretary of the Interior is permitted to issue a patent of railroad grant lands to the railroad company (or its successor-in-interest) where he finds that those lands had been sold by the company to an innocent purchaser for value prior to September 18, 1940, and the company (or its successor-in-interest) had released its claim to the land on or before September 18, 1941. See 49 U.S.C. § 65(b) (1976); 49 U.S.C. § 10721(a)(2) (1988); 43 CFR Subpart 2631; Southern Pacific Transportation Co., 54 IBLA 174, 178 (1981). The initial question presented by the instant appeal is whether Perrin purchased the SW¼ SW¼ sec. 3 from Central Pacific prior to September 18, 1940, such that Southern Pacific may be entitled to a patent of that land for the benefit of the Heirs if all other requirements are met. 4/

The controlling regulation regarding the necessary proof is 43 CFR 2631.1. That regulation provides that, in conjunction with a patent application, the applicant must establish its interest in the land sought by furnishing "[f]ull details" of the sale by which it acquired its interest (such as the date, terms, consideration, parties, amounts and dates of payment made and/or amounts due, and transfers of title) and

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4/ BLM has not challenged the chain of title by which the Heirs acquired Perrin's purported interest in the SW¼ SW¼ sec. 3. Thus, we will not address that issue.

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also "[a]vailable documentary evidence, including the contract or deed."43 CFR 2631.1. Moreover, the regulation states that "[n]o application for a patent * * * will be favorably considered unless it be shown that the alleged purchaser is entitled forthwith to the estate and interest transferred by such patent." Id.

Southern Pacific and the Heirs have failed to provide a copy of a deed by which Central Pacific conveyed the SW¼ SW¼ sec. 3 to Perrin. Rather, they have tried to establish the existence of a deed "on the basis of ancillary documents, particularly business records of Central Pacific Railroad made at the time the property was transferred to Joseph Perrin, and [the fact] that he paid for it in full" (Letter to BLM from Robert A. Rehberg, dated Jan. 26, 1990, at 1). The documentary evidence submitted to BLM includes a copy of "Treasurer's Receipt" (No. 124), dated June 2, 1871, issued by Central Pacific to indicate the receipt of $400 from Perrin for the purchase of 160 acres of land, including the SW¼ SW¼ sec. 3. See Exh. B attached to "Application for Patent." It further appears from the record that Perrin's name and a description of the tract at issue appears on a list of innocent purchasers for value of unpatented railroad grant lands from Central Pacific prior to September 18, 1940. See Encl. 2 attached to Decision; Decision at 3. The receipt also acknowledges that payment of $400 is payment "in full" for the lands sold including the tract at issue (Exh. B attached to "Application for Patent"). Also a part of the case file is a "Record of Granted Lands," for the Central Pacific, which confirms that the purchase price for this land was in fact paid in full. 5/ See Encl. 4 attached to Decision. 6/ Indeed, it appears that $400 (or $2.50/acre) constituted the entire purchase price. See Southern Pacific Transportation Co., 54 IBLA at 179; Southern Pacific Co., 71 I.D. 224, 227 (1964); Austin v. Luey, 21 L.D. 507, 509 (1895).

5/ The record of granted lands identifies the granted tract as "Lot 33 of SW" of sec. 3 embracing 32.56 acres.

6/ We do not construe the document titled "Record of Granted Lands" as constituting proof that Central Pacific in fact conveyed the SW¼ SW¼ sec. 3 to Perrin. We are convinced that the term "Granted" referred to the original grant from the United States. The left half of the document is entitled "Granted Lands" (Encl. 4 attached to Decision). Under that heading are columns for listing descriptions of the granted lands and the numbers of any relevant patents of the land from the United States to Central Pacific. The right half of the document is entitled "Disposition of Land." Id. Under this heading are columns for listing relevant lease, sale, and deed numbers. This clearly permitted the listing of any disposition made by Central Pacific of the granted land. In the case of the tract at issue, we note that under the column labelled "Sales, No. of Contract" there is a reference to "124." Id. That is the number of the Treasurer's Receipt. Further, under column labelled "Deed No." there is no reference to a deed, but only the statement that the purchase price had been "Paid In Full." Id.

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BLM found that Perrin did enter into a contract to purchase the land, but was unable to conclude that the contract was ever consummated with "pass[age of] title" to the land to Perrin. See Decision at 2, 6; Answer at 1. It thus rejected the patent application on this basis. See Decision at 6. We must agree that, in the absence of a copy of a deed, 7/ there is no proof of a conveyance.

In their statement of reasons for appeal (SOR), the Heirs contend that they have provided sufficient evidence of a sale by Central Pacific to Perrin, arguing that the receipt tendered in support of the application constitutes a contract to sell the tract of land as well as a receipt for payment. Thus, appellants assert that Perrin was the equitable owner of the property entitled to issuance of a deed if one in fact had not been issued.

In its answer supporting the decision below, BLM argues that there is no evidence that the sale transaction was ever consummated, suggesting that Perrin received a refund or other satisfaction from Central Pacific. It is noted that Perrin was experienced in real estate acquisition having recorded with the Nevada County recorder 53 land transactions in his name alone. Thus, BLM contends, it is unlikely that Perrin would have failed to record a deed to land that he had purchased. Further, BLM asserts that Perrin's experience as a landowner and mine owner in the Mother Lode country would cause him to know that a railroad is not entitled to mineral lands. In view of the fact that Marie Petitjean had a mine and workings on the land at issue, BLM asserts that Perrin satisfied his claim against Central Pacific in another manner and never received a conveyance of the tract at issue.

[1] There is no requirement in the Act of October 17, 1978, or formerly in section 321(b) of the Transportation Act of 1940, that a contract to purchase railroad grant lands be consummated with a conveyance or specifically that a deed be issued, in order to entitle the railroad

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7/ There is a reference to a deed from Central Pacific to Perrin dated Aug. 28, 1871, in a State court judgment filed in support of appellants' application. By decision dated July 11, 1989, BLM required Southern Pacific to submit a copy of the deed. Eugene F. Snow, representing the Heirs, responded on Aug. 4, 1989, stating that the deed had likely been mailed to a post office box in Grass Valley, Nevada County, California, but was now "presumed lost" (Letter, dated July 15, 1989, at 2). He did not state the basis for his conclusion that a deed had been mailed. Indeed, the record does not reflect that a deed has ever been issued since Southern Pacific has been unable to furnish a copy of a deed to Perrin. See Letter to Snow from Chulla, dated Mar. 22, 1984 ("Due to the destruction of our records in the San Francisco fire of 1906, we do not know if a deed was ever issued").

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company to a patent on behalf of an innocent purchaser for value (or his successors-in-interest). Rather, those statutes require, by their terms, only that there be established to the satisfaction of the Secretary that the land has been "sold by [the railroad company] to an innocent purchaser for value." 49 U.S.C. § 65(b) (1976); 49 U.S.C. § 10721(a)(2) (1988) (emphasis added). Thus, there need be established only that a sale has occurred. Focussing on proof of a sale furthers the remedial purpose of the statute, especially in those instances where the railroad company (or its predecessor-in-interest) may have wrongfully withheld, or even simply failed to effect (for whatever reason), issuance of a deed to which the purchaser was entitled.

Further, section 321(b) of the Transportation Act (and thus the Act of October 17, 1978) protected rights based on section 5 of the Act of March 3, 1887, 43 U.S.C. § 898 (1988). 8/ See Southern Pacific Co., 71 I.D. at 229. Section 5 of the 1887 Act permitted a "bona fide purchaser" from a railroad company of its unpatented grant lands to seek relief (in the way of a patent) from the United States if the lands were (for any reason) excepted from the grant. 43 U.S.C. § 898 (1988). It is said in the case of that statute that those seeking its benefit must establish, as to the manner of acquiring the grant land, only that the land "shall have been sold to them by a railroad company as a part of its grant." Letter from Attorney General Garland to the Secretary of the Interior, 6 L.D. 272, 275 (1887) (emphasis added). Similarly, the Secretary said in Pierce v. Musser-Sauntry Co., 19 L.D. 136, 139 (1894): "If the lands were purchased in good faith * * * the equity is established."

Moreover, it has been held that to require that the "sale or purchase must be absolute, in the sense of a fully consummated and completed one, in order to be protected" would render the "operation of the [1887 A]ct * * * very limited and circumscribed." Schneider v. Linkswiller, 26 L.D. 407, 409 (1898), aff'd, 95 F. 203 (N.D. Iowa 1899) (construing similar "good faith" purchaser protection language in 43 U.S.C. § 897 (1988)). This was not intended by Congress. See 26 L.D. at 409. The Supreme Court in

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8/ It has been said, in effect, that section 321(b) of the Transportation Act did not itself authorize the issuance of patents for the benefit of innocent purchasers for value, but rather, despite the railroad company's release, "preserved such rights as could have been perfected under the existing law, including the 1887 Act." Southern Pacific Co., 20 IBLA 365, 378 n.1 (1975) (Thompson, A.J., concurring). Thus, section 321(b) simply recognizes the authority contained in the 1887 Act. See also Laden v. Andrus, 595 F.2d 482, 485 n.3 (9th Cir. 1979) (aff'g. Southern Pacific Co., 20 IBLA 365 (1975)); Southern Pacific Transportation Co., 35 IBLA 270, 272, 273-74 (1978); Southern Pacific Transportation Co., 32 IBLA 218, 222 n.1 (1977); Atlantic & Pacific Railroad Co., 58 I.D. 577, 581-82 (1944). The same is also true of the Act of Oct. 17, 1978.

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Gertgens v. O'Connor, 191 U.S. 237, 243 (1903) (construing 43 U.S.C. § 898 (1988)), and the court in United States v. Southern Pacific Railroad Co., 88 F. 832, 839 (S.D. Cal. 1898) (construing 43 U.S.C. § 897 (1988)), both upheld this interpretation, especially in view of the liberal construction to be afforded such a remedial statute. See also United States v. Southern Pacific Railroad Co., 184 U.S. 49, 56-57 (1902). In the end, as the Supreme Court said: "If there is a sale it is sufficient." 191 U.S. at 243. This has been the practice of the Department. See Ray v. Gross, 27 L.D. 707 (1898) (arising under 43 U.S.C. § 897 (1988)); Austin v. Luey, supra; Sethman v. Clise, 17 L.D. 307 (1893). Indeed, the Secretary held in Austin that proof of issuance of a deed was unnecessary, stating:

> When we come to consider the spirit and purpose of the act of Congress of March 3, 1887 * * *, I think it will be apparent that it was intended to cover contracts other than those evidenced by deed, since it applies exclusively to lands sold or contracted away by railroad companies before such companies had themselves obtained title or patent. Obviously, the terms purchase and sale, as used in said act, are not to be understood in their technical and limited meaning, but rather in their widest and most comprehensive meaning, which would, I think, include such contracts for the sale of such lands, as had been performed in whole or in part by the purchaser, * * * no matter how such contracts were evidenced, so that they were clearly and satisfactorily proven.
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> Certainly Congress did not proceed upon the idea that the companies, as a rule, would execute deeds before they obtained patents, nor did they intend to exclude from the provisions of the act all contracts in reference to sales which were not evidenced by the execution of a deed.

21 L.D. at 511.

Nor is evidence regarding issuance of a deed required by Departmental regulation. The applicable regulation only states that "[f]ull details of the alleged sale must be furnished" and "[a]vailable documentary evidence * * * should be filed." 43 CFR 2631.1. The relevant regulation states that "[e]vidence of a recorded deed of conveyance from the [railroad company] to the purchaser may be required." 43 CFR 2631.1. Further, while the regulation states that the "deed * * * should be filed," we conclude that such particular evidence (as with documentary evidence generally) is qualified by the term "[a]vailable." 43 CFR 2631.1. Thus, we find that the regulation requires that the deed (as well as other documentary evidence) should be filed if available. In the present case, the deed by which Central Pacific conveyed the SW¼ SW¼ sec. 3 to Perrin is not available and, hence, we must conclude that Southern Pacific (and the Heirs)

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had, at the time of the August 1991 BLM decision, provided all available documentary evidence regarding the sale to Perrin. They had thus complied with the regulation.

Moreover, we hold that Southern Pacific (and the Heirs) had provided satisfactory evidence that the SW¼ SW¼ sec. 3 was sold to Perrin in 1871, since they had shown that Central Pacific regarded the purchase price as paid in full in 1871. That is evident from Central Pacific's "Treasurer's Receipt" and its "Record of Granted Lands." This evidence establishes that the contract was executed and that Perrin had paid for the tract at issue. Further, the Heirs have recently unearthed a copy of the June 2, 1871, contract (No. 124) by which Central Pacific agreed to convey the SW¼ SW¼ sec. 3 (as well as the land in sec. 15) to Perrin. 9/ See Exh. A attached to Second Supplemental SOR. The contract further confirms that the purchase price ($400) had been paid in full by Perrin. 10/ Thus, the record contains adequate evidence that the sale to Perrin occurred.

Although the record on appeal does not sustain the basis for rejection of the application stated in the BLM decision, other aspects of the record are inconsistent with the assertion that Perrin was an "innocent purchaser" of the tract. As noted previously, mineral lands were, by express statutory language, not subject to the railroad grants. At the time of the survey of the subdivisions of the public lands in this township in 1869 (prior to the sale to Perrin) the surveyor noted in his field notes the presence of "hydraulic gold washing" on the tract at issue. This notation is also found within the SW¼ SW¼ of sec. 3 on the official plat of survey approved August 10, 1870. Further, sec. 3 is identified as "mineral land" on the survey plat.

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9/ The Heirs state that the contract has only recently been discovered in the papers of Perrin's estate. See Second Supplemental SOR, dated Aug. 30, 1993, at 1.

10/ As the Heirs correctly note, the contract explains why there is no evidence of a deed from Central Pacific to Perrin with respect to the land in sec. 3. It states that Central Pacific "agree[d] to execute and deliver to * * * Perrin, his heirs and assigns, after they shall have received a patent therefor from the United States and within thirty days after a demand therefor by the said purchaser, and upon the surrender of this agreement, a deed in fee simple for the conveyance of said premises to the said purchaser" (Exh. A attached to Second Supplemental SOR). This appears to have been Central Pacific's general practice. See Austin v. Luey, supra at 510. However, the United States never issued a patent as to the land in sec. 3 to Central Pacific. Thus, under the terms of the contract, it is likely that no deed in turn was ever issued by Central Pacific to Perrin or his successors-in-interest.

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Additionally, the record discloses that the SW¼ SW¼ was the subject of a private contest hearing before this Department. Specifically, a copy of a letter dated August 1893 from the Commissioner of the General Land Office to the Register and Receiver at Sacramento, California, affirming the cancellation of the Central Pacific's selection of that tract has been made a part of the record in this case. The letter discloses that T. Pettijean filed a contest against the Central Pacific which selected the lands in 1885 and included the tract in list of selections No. 7. The basis for the contest was Pettijean's affidavit asserting that the lands were "mineral in character and more valuable for mineral than for agricultural purposes, and that their mineral character was well known at the time the grant was made to contestee." The letter reveals that a hearing was held on December 9, 1892, to determine whether the land was mineral in character at which both parties appeared with counsel and the testimony of witnesses was taken. On January 21, 1893, a decision was rendered, based upon the evidence at the hearing, that the tract of land was mineral in character. No appeal was taken and, hence, the Commissioner's letter advised that the decision was upheld, the contest closed, and the Central Pacific's selection cancelled as to the tract at issue.

Relying on Clogston v. Palmer, 32 L.D. 77 (1903), decided under the Act of March 3, 1887, authorizing the sale of lands within the bounds of railroad grants (not actually conveyed to the railroad) to bona fide purchasers from the railroad, the Department has held that the known character of the land at the time of purchasing from the railroad is dispositive for applications under section 321(b) of the Transportation Act of 1940. Southern Pacific Company, 71 I.D. at 230-31. The issue is whether the lands were known to be mineral in character at the time of purchase from the railroad. Id. at 232. Land is mineral in character if the known conditions are such as to reasonably engender the belief that the lands contain mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end. Id. at 233, citing United States v. Southern Pacific Co., 251 U.S. 1 (1919). Upon remand of this case, BLM should ascertain whether this tract of land was known to be mineral in character at the time of Perrin's purchase from the railroad. 11/ While the 1892 contest to which Perrin's predecessor-in-interest was a party may not be conclusive on the mineral character of the land in 1871, 12/ we think the doctrine of laches bars any reduction of the burden of proof on appellants to the extent that the character of the land is difficult to ascertain after more than 100 years. Southern Pacific Co., 20 IBLA at 380-81 (Thompson, A.J., concurring).

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11/ The BLM decision below did not address this issue.

12/ See Southern Pacific Co., 71 I.D. at 229-32 (applying rule of Clogston v. Palmer, 32 L.D. 77 (1903) to find that critical date for ascertaining mineral character of the land is the date of purchase from the railroad).

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Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded.

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C. Randall Grant, Jr.
Administrative Judge

I concur:

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John H. Kelly
Administrative Judge